83-18

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

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QUESTIONS PRESENTED FOR REVIEW

The issue presented in this case is whether the First Amendment's limitations on the award of presumed and punitive damages for libel, first enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to "non-media" defendants. The questions presented for review are:

I. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed compensatory damages or "general" damages for libel against a "non-media" defendant?

II. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover punitive damages for libel against "non-media" defendants under a standard of liability less demanding than the "actual malice" standard of *New York Times v. Sullivan*?

III. Did the trial court's instructions on presumed and punitive damages in this libel action violate the First and Fourteenth Amendments?

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The order of the Superior Court of Washington County, Vermont granting Dun & Bradstreet, Inc.'s motion for new trial is unreported. It is reprinted in the Appendix at B1-B3.

GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

Petitioner seeks issuance of a writ of certiorari to review an order and opinion of the Supreme Court of the State of Vermont dated and entered April 15, 1983. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I, which provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

U.S. Const. amend. XIV, § 1, cl. 2:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a libel action brought by Greenmoss Builders, Inc. ("Greenmoss") against Dun & Bradstreet, Inc. ("D&B")[1] petitioner herein, a publisher of financial reports.[2] The action was brought in the state courts of Vermont and was tried before a jury. The jury returned a verdict for Greenmoss in the amount of $50,000.00 compensatory damages and $300,000.00 punitive damages.

1. The Facts

D&B publishes financial and related information concerning businesses to its subscribers. As part of a continuous service, D&B publishes "Special Notices" to subscribers interested in a particular business. On July 26, 1976, D&B reported in a Special Notice to five of its subscribers that Greenmoss had filed a voluntary petition in bankruptcy.[3]

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[1] Dun & Bradstreet, Inc. is a wholly owned subsidiary of the Dun & Bradstreet Corporation. The non-wholly owned subsidiaries of the Dun & Bradstreet Corporation are Donnelley & Gerrardi Verwaltungs-GmbH., Donnelley & Gerrardi GmbH. & Co. K.G., Dun & Bradstreet S.L., and Dun & Bradstreet A.G. Affiliates of Dun & Bradstreet International, Ltd., a wholly owned subsidiary of Dun & Bradstreet Corporation, are: Thomson Directories Ltd., Thomson Directories, Thomson Sales & Services Ltd., DBH Wirtschaftsdatenbank GmbH., Dun & Bradstreet (HK) Limited, and Telemarketing Italia S.p.A.

[2] D&B publishes financial and other information concerning businesses. It is not a consumer reporting agency.

[3] If a D&B subscriber has received information on a particular business within twelve months of the issuance of a Special Notice, that subscriber will automatically receive the Special Notice. Here, the Special Notice concerning Greenmoss was sent to the Howard Bank, American Express Company, State Mutual Insur-

On August 3, 1976, eight days after the publication of the Special Notice, Greenmoss' president contacted D&B's regional office in Manchester, New Hampshire and advised D&B that the Special Notice was in error. On that same day, a retraction in the form of a "Correction Notice" was issued explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself. This Correction Notice was sent to each of the five subscribers who had received the original Special Notice.

2. The Proceedings Below

At trial, Greenmoss claimed that it was libeled by the publication of the Special Notice. Greenmoss did not offer testimony from *any* of the five subscribers or any other disinterested person to prove that the publication of the Special Notice caused damage. The company's sole evidence on damages was the testimony of its own former president, who had a pecuniary interest in the outcome of the case. He speculated that although the company's profits had increased after the Special Notice, they had fallen short of expectations. He also estimated that the company had incurred expenses of $2,000 - $5,000 to contact individuals to refute the erroneous information.

Greenmoss contended that the Special Notice had prompted one of the five subscribers, a bank, to terminate its lending relationship with the company. But a representative of the bank, called by D&B, testified that the bank's decision was not made on account of

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ance Company, Goodyear Tire and Rubber Company, and Aetna Insurance Company.

the Special Notice but for other reasons by two bank officers who had no knowledge of it.

The trial court instructed the jury that this was an action for libel *per se* and that damages, therefore, were presumed:

> Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous per se. This means that the *Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed.* (emphasis added).

Later, the Court added:

> Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel *per se, damages are presumed and actual damages may not be proven,* you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although *the law presumes damages in some amount in a case of libel* per se *and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred,* the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you

> to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant. (emphasis added).

Thus, the trial court's instructions on libel *per se* permitted an award of presumed damages and relieved Greenmoss of the necessity of proving damages by specific proof.

The trial court also instructed the jury that it could award punitive or exemplary damages upon a finding that D&B acted with "actual malice." The court did not define "actual malice." It defined "malice" as follows:

> If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously . . . . (emphasis added).

D&B timely objected to the portions of the court's instructions on libel *per se* and punitive damages.

Following the trial court's instructions on presumed and punitive damages, the jury returned a verdict for Greenmoss in the amount of $350,000.00, consisting of $50,000.00 compensatory damages and $300,000.00 punitive damages. The $50,000 "compensatory" damage award exceeded Greenmoss' own evidence of actual damages. Greenmoss projected only $31,000 in lost profits ($50,000 "projected" profits less $19,000 profits actually earned), plus expenses not in excess of $5,000.

Thus, a substantial portion of the "compensatory damages" award did not even represent *alleged* actual damages.

D&B filed a timely post-trial motion for a new trial. D&B asserted that the trial court's instructions permitted the jury to award presumed damages and authorized the jury to award punitive damages based on less demanding proof than the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The trial court granted D&B's motion for a new trial on all issues and concluded that its jury instructions had not met the standards of *Gertz:*

> The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language in the charge may have misled the jury to believe that damages were presumed in some amount in the case.
>
> The United States Supreme Court held in *Gertz v. Robert Welch*, 418 U.S. 324:
>
> > "The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."
>
> Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for

> defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.
>
> Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted. (emphasis in original).

After other post-trial proceedings, the trial court granted Greenmoss' motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions concerning the propriety of its order granting a new trial. The issue underlying the certified questions was the applicability of *Gertz* to non-media defendants.

On appeal, the Vermont Supreme Court did not question the trial court's conclusion that the jury instructions were misleading under the standards enunciated in *Gertz*. Rather, the Vermont Supreme Court held that the constitutional limitations derived in *Gertz* from the First and Fourteenth Amendments were inapplicable. The Vermont Supreme Court characterized D&B as a "non-media defendant" and held:

> [W]e hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

Reaffirming the propriety of an award of presumed damages, the Vermont Supreme Court also held:

> [W]hen the defamation action is actionable per se the plaintiff can recover general damages with-

out proof of loss or injury, which is conclusively presumed to result from the defamation. . . .

REASONS FOR GRANTING THE WRIT

STATE AND FEDERAL COURT DECISIONS APPLYING GERTZ V. ROBERT WELCH, INC. IRRECONCILABLY CONFLICT AS TO BOTH RESULT AND RATIONALE.

A writ of certiorari should issue so that this Court can determine whether the constitutional protections against imposition of presumed and punitive damages in defamation cases established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to both "media" and "non-media" defendants.

This substantial First Amendment question is one which this Court has expressly reserved for decision.[4] It is a recurring question in both state and federal courts which only this Court can resolve. It is a question with which the lower courts are struggling and upon which they are reaching inconsistent results on uncertain and hopelessly conflicting rationales because no clear guidance has yet been given to them. This case, involving a plaintiff who is not a public figure and an allegedly defamatory statement which was neither published in a newspaper nor broadcast over

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[4] *See Babbit v. United Farm Workers National Union*, 442 U.S. 289, 309 (1979) ("We have not adjudicated the role of the First Amendment in suits by private parties against non-media defendants. . . ."); *Hutchinson v. Proxmire*, 443 U.S. 111, 113 n.16 (1979) ("This Court has never decided the question . . . [of whether 'the New York Times standard can apply to an individual defendant rather than to a media defendant.']").

radio or television, puts the question in clear form and provides a perfect opportunity for deciding it.

1. Gertz v. Robert Welch, Inc. Recognized First Amendment Limitations On Defamation Damages.

State and lower court opinions on the role of the First Amendment in defamation cases, although reaching conflicting results based upon inconsistent and indefensible rationales, have one thing in common—they all purport to be interpreting and applying the constitutional standards recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz* involved a libel action against the publisher of a monthly magazine espousing the views of the John Birch Society. The magazine had published an article describing plaintiff as a Communist sympathizer and participant in various Communist organizations and activities. Because plaintiff was a "private individual" and not a "public official" or "public figure," this Court held that the trial court erred in requiring plaintiff to meet the *New York Times Co. v. Sullivan* "actual malice" standard for liability:

> We hold that, *so long as they do not impose liability without fault*, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. (emphasis added).

Id. at 347. This Court made equally clear, however, that private individuals who recover under *liability* standards less severe than actual malice nevertheless remain subject to strict constitutional limitations with respect to *damages*:

> [W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.
>
> . . . .
>
> . . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 349-50. Thus, *Gertz* holds that public plaintiffs must show "actual malice" to establish liability; and that *all* defamation plaintiffs must show "actual malice" to recover presumed or punitive damages.

2. Lower Courts Interpreting Gertz Have Reached Conflicting Results.

Since this Court's decision in *Gertz*, confusion and disagreement about its applicability have plagued decisions of the state and lower federal courts. This conflict is most clearly grasped through comparison of the result reached by the Vermont Supreme Court in this case with the opposite result reached in a similar case by the Arizona courts.

In *Nelson v. Cail*, 120 Ariz. 64, 583 P.2d 1384 (Ariz.App. 1978), a building contractor accused an architect of slandering his business reputation. The contractor sought lost profits as well as punitive damages. After being instructed that it could presume damages from words which were slanderous *per se*, the jury awarded both compensatory and punitive damages. The Court of Appeals of Arizona, however, applying

Gertz, set aside *both* damage awards—the compensatory award on the ground that it constituted presumed damages; and the punitive award on the grounds that the *Sullivan* "actual malice" standards had not been charged.

As in *Nelson*, this case involves a private plaintiff building contractor alleging defamation to business reputation against a defendant who is neither a broadcaster nor publisher of books, magazines or newspapers. As in *Nelson*, the plaintiff here sought lost profits and punitive damages. As in *Nelson*, the jury was charged on a defamation *per se* theory of presumed damages, and was not given a proper charge with respect to "actual malice." Yet Arizona's application of *Gertz* in *Nelson* resulted in an award of nominal damages of $1.00, while Vermont's refusal to apply *Gertz* herein resulted in a verdict of $350,000.00, including punitive damages of $300,000.00.

Aside from *Nelson*, the following cases extend *Gertz* to non-media defendants. *DeCarvalho v. da Silva*, ___R.I. ___, 414 A.2d 806 (1980); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Avins v. White*, 627 F.2d 637 (3rd Cir.), *cert. denied*, 449 U.S. 982 (1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975); *Hammerhead Enterprises, Inc. v. Brezenoff*, 551 F. Supp. 1360, 1369 (S.D. N.Y. 1982), *Woy v. Turner*, 533 F. Supp. 102 (N.D. Ga. 1981); *Bussie v. Larson*, 501 F.Supp. 1107 (M.D. La. 1980); *Beneficial Management Corp. v. Evans*, 421 So.2d 92 (Ala. 1982); *Colson v. Stieg*, 89 Ill. 2d 205, 433 N.E. 2d 246 (1982); *Millsaps v. Bankers Life Co.*, 35 Ill. App. 3d 735, 342 N.E. 2d 329 (1976); *Anderson v. Low Rent Housing Commission*, 304 N.W. 2d 239 (Iowa), *cert. denied*, 454 U.S. 1086 (1981); *Williams v. Pasma*, ___

Mont. ___, 656 P.2d 212 (1982); *Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511 (N.M. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982); *Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334 (Tex. Civ. App. 1979); *McQuoid v. Springfield Newspapers, Inc.*, 502 F.Supp. 1050 (W.D. Mo. 1980) (dictum).

Cases which reach the opposite result include the decision of the Vermont Supreme Court here and *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Schomer v. Smidt*, 113 Cal.App.3d 828, 170 Cal.Rptr. 662 (1980); *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270 (Ky. 1982); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Denny v. Mertz*, 106 Wisc. 2d 636, 318 N.W.2d 141, *cert. denied*, ___ U.S. ___, 103 S. Ct. 179 (1982); *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W. 2d 737 (1975). *See generally, Recent Development, State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning*, 29 Vand. L. Rev. 1431 (1976).

3. Decisions of Lower Courts Interpreting Gertz Are Based Upon Conflicting Rationales And Analytically Indefensible Distinctions.

Most of the courts that have faced the issue are in accord with *Nelson* and contradict the decision of the Vermont Supreme Court. In *DeCarvalho, supra*, the Rhode Island Supreme Court refused to distinguish between classes or types of defendants in the application of First Amendment principles in defamation cases:

> Defining professional members of the media would be a difficult task indeed. This would re-

> quire drawing distinctions between free-lance writers and the occasional author of a book, article, or pamphlet on the one hand and regularly employed agents of a great metropolitan daily newspaper or broadcasting syndicate on the other. As far as we are aware, the freedom of the press enshrined in the First Amendment was designed to apply to the lonely pamphleteer as well as to the (then unknown) syndicated columnist. In any event, the short answer to this contention is that the Supreme Court of the United States has clearly applied the *New York Times* standard to nonmedia defendants in *St. Amant v. Thompson, supra* (a candidate for public office) and in *Garrison v. Louisiana, supra* (a district attorney). Thus the trial justice was correct in drawing no distinction between defendant in this case and so-called "media defendants."

414 A.2d at 813.

Similarly, in *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), the Maryland Court of Appeals reasoned:

> Although [*New York Times v. Sullivan*] . . . arose in a media context, the holding contained no caveat restricting its application to media publications; nor has the Supreme Court hesitated to apply it in non-media cases. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), the defamatory comments were made during a press conference, and in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), they were made during a televised speech. In both instances, the media merely served as a vehicle for the defamatory

statements by the defendants and the Court focused on free speech and public debate rather than on the protection of the media. In *Henry v. Collins*, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965), the Court in a short per curiam opinion applied *New York Times* where an individual who had been arrested by a police chief charged in a letter to a deputy sheriff and in a statement read to several wire services that the arrest was a "diabolical plot." Similarly, in non-media cases arising from labor disputes the Court has found the constitutional privilege applicable. *Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). A number of lower courts have also applied the *New York Times* standard in non-media cases, and one court has applied *New York Times* in an action by an officer of a private club for defamations arising out of communications between club members concerning his activities. *Evans v. Lawson*, 351 F.Supp. 279 (W.D. Va. 1972).

Nor do we discern any persuasive basis for distinguishing media and non-media cases. The rationale for the application of a constitutional privilege in *New York Times*, *Curtis* and *Gertz* is that the defense of truth is not alone sufficient to assure free and open discussion of important issues. Issues of public interest may equally be discussed in media and non-media contexts, and the need for a constitutional privilege, therefore, obtains in either case. *See* Restatement (Second) of Torts §580A, Comment h (Tent. Draft No. 21, 1975); *but cf.* Nimmer, *supra*. The proposition

that the press enjoys greater rights than members of the public generally was rejected by the Supreme Court in *Pell v. Procunier*, 417 U.S. 817, 834-35, 94 S.Ct. 2800, 41 L.Ed. 495 (1974), where a newspaper argued that it had a constitutional right to interview inmates of a state correctional system despite a regulation prohibiting such contacts.

. . . .

Any rule according less favorable treatment to certain types of non-media defendants might well present "difficult questions concerning the roles of the press and other speakers in our society." Anderson, *supra*, 53 Texas L. Rev. at 442-43 n. 95. Furthermore, most non-media private defamations arise in the context of one of the common law privileges; "[t]he completely gratuitous private defamation is rare." Thus, experience suggests that liability without fault is unusual in non-media private defamation cases. Frakt, *supra*, 6 Rutgers-Camden L.J. at 511.

Yet another reason for applying the *Gertz* holding to non-media defendants and to slander as well as libel is the compelling need for consistency and simplicity in the law of defamation. To limit the *Gertz* principles to media defendants and to cases of libel would mean one test, that of *New York Times*, for defamation of public officials and figures; another, which imposes a greater degree of proof than strict liability, and bans presumed and punitive damages, for cases brought by private plaintiffs against media defendants; and at least one more based on existing common law principles for all other defamation,

an area of tort law which, wholly apart from the advent of constitutional considerations, has traditionally been noted for its complexity. The rationale for applying the *Gertz* holding to non-media defendants and to slander as well as libel is aptly stated in the Restatement (Second) of Torts §580B, Comment e (Tent. Draft No. 21, 1975):

". . . As the Supreme Court declares, the protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests which must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

. . . There is little reason to conclude that the states would now be disposed to take the traditional strict liability approach for libel actions against the communications media, which has now been declared unconstitutional, and apply it to slander actions against private individuals, where it has not previously been significant."

350 A.2d at 694-96. *Accord, Avins v. White*, 627 F.2d 637, 649 (3rd Cir.) (". . . [N]on-extension of the *New York Times* privilege to private individuals [as opposed to institutional press defendants] . . . creates a dangerous disequilibrium between the first amend-

ment's guarantees of freedom of speech and the press."), *cert. denied*, 449 U.S. 982 (1980); *Anderson v. Low Rent Housing Commission*, 304 N.W.2d 239, 247 (Iowa) (finding "no basis in the plain language of the first amendment that would justify according greater protection to the media than to private parties. . ."), *cert. denied*, 454 U.S. 1086 (1981).

In *Beneficial Management Corp. of America v. Evans*, 421 So.2d 92 (Ala. 1982), the court made clear that private plaintiffs are restricted to compensation for actual injury, even in suits involving non-media defendants:

> This Court has decided that the *Gertz* rule shall apply to non-media defendants; therefore, since *Gertz* abolishes the notion of "presumed damages" and limits compensation in defamation cases which are actionable per se to recovery for actual injuries only, we hereby recognize this to be the law of Alabama.

Id. at 96. *Accord, Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511 (N.M. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982); *Millsaps v. Bankers Life Co.*, 35 Ill. App.3d 735, 342 N.E.2d 329 (1976); *Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334 (Tex. Civ. App. 1979); *see also, McQuoid v. Springfield Newspapers, Inc.*, 502 F. Supp. 1050, 1054 (W.D. Mo. 1980) ("*Gertz* standards apply in *all* defamation actions regardless of the status of the defendant.") (dictum) (emphasis in original) (*citing Rimmer v. Colt Industries Operating Corp.*, 495 F. Supp. 1217 (W.D. Mo. 1980), *rev'd on other grounds*, 656 F.2d 323 (8th Cir. 1981)).

Attempts by the Vermont Supreme Court and other minority jurisdictions to limit application of the rules

announced in *Gertz* lack sound analytical basis. In *Calero, supra*, for example, the Wisconsin Supreme Court refused to apply *Gertz*'s punitive damages rules by characterizing the content of the allegedly defamatory message:

> Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.

228 N.W.2d at 747. Yet this Court has flatly rejected attempts to analyze First Amendment protections in terms of the political utility or other supposedly beneficial content of the message. Indeed, dissatisfaction with "content" regulation was the very reason why this Court in *Gertz* discarded the "newsworthiness" test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). The *Gertz* Court wished to avoid

> . . . forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not— . . . We doubt the wisdom of committing this task to the conscience of judges.

Gertz, supra, 418 U.S. at 346; *see also, Sullivan, supra*, 376 U.S. at 271 ("The constitutional protection does not turn upon the truth, popularity or social utility of the ideas and beliefs which are offered."); *Time, Inc., v. Hill*, 385 U.S. 374 (1967); (applying *Sullivan* rule to *Life* magazine review of play); Shiffrin, *Defamatory Non-media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 926 (1978) ("*Gertz* plainly states that communications which are deemed to have nothing to do with self-government

and which do not relate to public issues fall within the ambit of first amendment protection. . .").[5]

Content is not the only ground upon which lower courts have managed to avoid applying *Gertz*. In this case and in others, courts have sought to restrict the class of speakers (defendants) who may invoke its protections. Like the Vermont Supreme Court here, the court in *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980) sought to limit *Gertz* to some undefined class of "media" defendants. And in *Columbia*

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[5]Prior to *Gertz*, some courts had applied *Rosenbloom's* nowdiscarded "public interest test" to deny First Amendment protection to financial reports. *See Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3rd Cir.) ("business or credit standing" held not a "matter of real public interest"), *cert. denied*, 404 U.S. 898 (1971); *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972). These decisions involved precisely the type of *ad hoc* content-based adjudication ended by *Gertz*'s rejection of *Rosenbloom*.

Moreover, to the extent content remains at all pertinent, this Court has since made clear that the type of financial information at issue herein is unquestionably worthy of First Amendment protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court acknowledged society's "strong interest in the free flow of commercial information;" and pointed out that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763 and 764. *See* Christie, *supra*, 75 Mich. L. Rev. at 66 ("[T]he distinction between commercial and noncommercial speech is breaking down, as well it should. Freedom of speech is, after all, of concern in commercial as well as in other contexts."); *see also, Hammerhead, supra*, 551 F. Supp. at 1369 ("There is no requirement that a defendant seek broad public circulation of his views in order to be protected by *New York Times v. Sullivan*").

Sussex Corp. v. Hay, 627 S.W.2d 270, 277 (Ky. 1982), *Gertz* was held applicable only to a group designated as the "communication industry."

These speaker-based distinctions are ultimately indefensible. *First*, to the extent these distinctions are based upon the "worth" or "value" of messages likely to be disseminated by particular speakers, they are merely a disguised form of the type of "content" regulation previously rejected by this Court and inconsistent with First Amendment jurisprudence. *See* Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1885-86 (1982). *Second*, the distinction produces arbitrary results—a newspaper or television broadcasting verbatim the statement of an individual can "create" a constitutional privilege otherwise inapplicable to the individual's statement. Or, as in this case, the same financial information published by D&B would have been adjudicated differently if published in a local newspaper. *Third*, the justification for imposing more lenient rules upon the institutional press—paid professionals whose widespread communications threaten the greatest damage—is doubtful. *Jacron, supra*, 350 A.2d at 695. *Fourth*, such distinction injects needless complexity into the law to the extent "media" and "non-media" defendants are to be differentiated and then subjected to differing standards, sometimes even in the context of the same case. *See The Public Figure Plaintiff, the Nonmedia Defendant and Defamation Law: Balancing the Respective Interests*, 68 *Iowa L. Rev.* 517, 524 n.56 (1983) ("[T]he definitions of public figure and media defendant are unclear.") *Finally*, a special and exalted status for the press in defamation cases is unsupportable as a matter of constitutional history. *See*

First National Bank of Boston v. Bellotti, 435 U.S. 765, 797-802 (1978) (Burger, C.J., concurring); Lange, *The Speech and Press Clauses*, 23 UCLA L. Rev. 77 (1975).

This Court has never expressly limited its holdings in *Sullivan* or *Gertz* to "media" or any other class of defendants. *Sullivan* itself applied the same "actual malice" test to both *The New York Times* as well as the private individual defendants who had placed the allegedly defamatory advertisement. *Sullivan, supra*, 376 U.S. at 286. *Accord, St. Amant v. Thompson*, 390 U.S. 727 (1968) (*Sullivan* test applied in case involving individual not a member of institutional press). Thus, apart from engendering confusion and unfairness, the decision of the Vermont Supreme Court and others like it depart from this Court's attempted development of a coherent body of constitutional law in defamation cases. D&B respectfully submits that the time has come for this Court to reach and decide the questions raised by this petition.

Commentators have bemoaned the chaotic state of defamation law and have urged that this Court re-examine it. *See* Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43 (1976); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 935 (1978); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876 (1982) (advocating novel "context-based" transactional approach).

As Professor Christie has persuasively reasoned:

> [T]he distinction between the press and the rest of us will simply not hold up, either on historical or practical grounds.
>
> . . . .
>
> The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it. The underlying reason for these difficulties is likely traced to the fundamental assumption in *Sullivan* that it is possible to have different standards of liability depending on who is involved or, as the later cases have demonstrated, on what is involved.
>
> . . . .
>
> [One] . . . reason to believe that the . . . Court will be obliged to generalize the *Gertz* solution to cover all cases of injury to reputation is the Court's gradually increasing awareness that many of the traditional methods of distinguishing among types of speech do not make much sense.
>
> . . . .
>
> *The only way to accommodate all the conflicting interests in a manner that is socially acceptable, therefore, will be to generalize the Gertz negligence and actual damage solution.*

Christie, *supra*, 75 Mich. L. Rev. at 58, 63, 64, 66 (emphasis added), *Accord*, 52 Wash. L. Rev. 975, 979 n.29 (1977); Shiffrin, *supra*, 25 UCLA L. Rev. 915, 935 (1978); *see also, Qualified Privilege to Defame Employees And Credit Applicants*, 12 Harv. C.R.-C.L.L. Rev. 143, 173 (1977) (Supreme Court extension of *Gertz* to all defendants deemed "likely").

CONCLUSION

Holding squarely that the First Amendment's limitatons on damages for libel are inapplicable to non-media defendants, the Vermont Supreme Court approved the trial court's presumed and punitive damages instructions. D&B respectfully submits that a writ of certiorari should issue so that this Court can reverse the Vermont Supreme Court's holding that *Gertz* is inapplicable to non-media defendants.

The issue presented in this case transcends the interests of the individual litigants. Conflict and confusion as to the applicability of *Gertz* are rampant in both the state and federal courts. The recurring split in results reached by the courts, as well as the inconsistent and indefensible rationales offered even among courts reaching the same result, attest to the need for resolution of the questions posed by this petition. Issuance of the writ is vital to ensure effective and fair implementation of the fundamental dictates of the First Amendment.

Respectfully submitted,

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APPENDIX

APPENDIX A

ENTRY ORDER

SUPREME COURT DOCKET NO. 173-81
NOVEMBER TERM, 1982

Greenmoss Builders, Inc.
v.
Dun & Bradstreet, Inc.

APPEALED FROM:
Washington Superior Court
DOCKET NO. S326-77WnC

In the above entitled cause the Clerk will enter:

Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.

FOR THE COURT:

Dissenting:

/s/ WILLIAM C. HILL,
Associate Justice

Concurring:

_____ /s/ ALBERT W. BARNEY,
Chief Justice

_____ /s/ FRANKLIN S. BILLINGS, JR.,
Associate Justice

_____ /s/ WYNN UNDERWOOD,
Associate Justice

_____ /s/ LOUIS P. PECK,
Associate Justice

A2

No. 173-81

Greenmoss Builders, Inc. Supreme Court

v. On Appeal from Washington Superior Court

Dun & Bradstreet, Inc. November Term, 1982

Thomas L. Hayes, J.
Villa & Heilmann, Burlington, for plaintiff-appellant
Young & Monte, Northfield, for defendant-appellee

PRESENT: Barney, C.J., Billings, Hill, Underwood and Peck, JJ.

HILL, J. Plaintiff, a residential and commercial building contractor, brought this defamation action against defendant as a result of an erroneous credit report issued to defendant's subscribers (plaintiff's creditors). The credit report alleged that plaintiff had filed a voluntary petition in bankruptcy and, in addition, grossly misrepresented plaintiff's assets and liabilities. The false nature of the report's allegations has never been disputed.

In its complaint, plaintiff asserted that the consequences of defendant's report, which it insisted was published with reckless disregard for truth and accuracy, were a damaged business reputation, loss of company profits, and loss of money expended to correct the error. In response, defendant claimed both a constitutional and common law qualified privilege against defamation actions, and on that basis contended that since its report was published in good faith, it could not be held liable.

After a trial by jury, a verdict was returned in favor of plaintiff for $50,000 in compensatory or actual damages, and $300,000 in punitive damages. Thereafter, defendant filed timely motions for judgment notwithstanding the verdict, V.R.C.P. 50, and for new trial, V.R.C.P. 59, on the issues of liability and damages. The trial court, persuaded that the evidence was sufficient as a matter of law to create issues of fact for the jury as to both liability and damages, denied defendant's motions for judgment notwithstanding the verdict. Upon reviewing its jury instructions, however, the trial court concluded that it had incorrectly charged those standards of liability enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and granted defendant's motions for new trial on all issues.

This action is before us pursuant to an Interlocutory Order by the Washington Superior Court, V.R.A.P. 5(b)(1), certifying five questions of law for our resolution. (1) Did the trial court err in granting defendant's motion for a new trial on all issues? (2) If the answer to the first question is in the affirmative, should the court have entered judgment on the verdict? (3) If the answer to the first question is in the affirmative, should the court have ordered a new trial on: (a) damages only? (b) compensatory damages only? (c) punitive damages only? (4) Did the court err in denying all motions of the defendant for judgment notwithstanding the verdict? (5) If the answer to the fourth question is in the affirmative, should the court have: (a) granted defendant's motion to enter judgment for the defendant on the issue of punitive damages, notwithstanding the verdict? (b) granted the motion of the defendant for judgment on the issue of compensatory damages, notwithstanding the verdict? (c) granted judgment for the defendant on all issues? In light of

our disposition of the first four questions, we need not address the fifth question.

We begin with a review of the record. Defendant operates a business in which factual and financial reports about individual business enterprises are issued exclusively to subscribers of defendant's service. These subscribers, usually creditors of the reported enterprises, may contract for "continuous service reports" which enable them to receive all report updates about a particular business over a year's time from the subscriber's initial inquiry. The reports are based on information solicited from the business itself, the business' banking and credit sources, from trade suppliers, and from public records such as annual reports filed with the Secretary of State and reports of bankruptcy petitions.

On or about July 26, 1976, plaintiff's president met with a representative of its principal creditor, a bank, to discuss the possibility of future financing. During the meeting, the bank's representative informed plaintiff's president that he had just received a credit report issued by defendant indicating that plaintiff had recently filed a voluntary petition in bankruptcy. Plaintiff's president testified that he was both shocked and confused when confronted with the report, since plaintiff had never filed such a petition and, at the time the report was published, plaintiff's business was steadily expanding. In fact, plaintiff's president later testified that prior to the issuance of the credit report, plaintiff had never suffered a major economic reversal and its financial condition was sound. Nevertheless, despite the bank representative's trial testimony that he never really believed the report, the bank put off any future consideration of credit to plaintiff until the

discrepancy was cleared up. The bank later terminated plaintiff's credit allegedly for reasons unrelated to the report.

Plaintiff's president immediately contacted defendant's regional office in Manchester, New Hampshire. He explained the error to defendant's regional supervisor and requested, in addition to an immediate correction, a list of those creditors who had received the false reports in order that they might be reassured of plaintiff's solvency. Defendant's representative stated that the matter would be looked into, but refused to divulge to plaintiff's president the names of the creditors who had received the report.

The basis of the error was established at trial: a former employee of plaintiff, and not plaintiff, had filed a voluntary petition in bankruptcy. Defendant's employee, a seventeen year old high school student, paid $200 annually to review Vermont's bankruptcy petitions, had inadvertently attributed the former employee's bankruptcy petition to plaintiff itself, and reported the information as such to defendant. A representative of defendant testified that prior to the issuance of a credit report indicating a bankrupt business, it was defendant's routine practice first to check the report's accuracy with the business itself. No prepublication verification was ever attempted in the present case.

On or about August 3, 1976, having satisfied itself that its credit report on plaintiff was wrong, defendant issued a corrective notice to the five subscribers who had received the initial report. In substance, the corrective notice stated that it was a former employee of plaintiff, not plaintiff itself, who had filed the petition in bankruptcy, and that plaintiff "continued in busi-

ness as usual." Plaintiff informed defendant that it was dissatisfied with the corrective notice, since it implied that the initial mistake was attributable to plaintiff, not defendant. Plaintiff again demanded a list of subscribers who had seen the report, but its request was once again denied.

Thereafter, plaintiff refused to provide defendant with any further financial data, and requested that defendant inform anyone seeking such data that it was being withheld pending the outcome of plaintiff's defamation action against defendant. Instead, defendant issued plaintiff a "blank rating," indicating that plaintiff's circumstances were "difficult to classify" within defendant's rating system, and such information was distributed to those creditors who requested a current indication of plaintiff's financial status. A short while later, plaintiff commenced its defamation action.

I.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that a "public official" was prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he [or she] proves that the statement was made with 'actual malice,' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80; *Burns v. Times Argus Association*, 139 Vt. 381, 384, 430 A.2d 773, 775 (1981). Three years later, the media protection established in *New York Times* was extended to cover defamatory falsehoods published about "public figures." *Curtis Publishing Company v. Butts*, 388 U.S. 130, 155 (1967). In *Gertz v. Robert Welch, Inc., supra*, the Supreme Court, in the last major pronunciation of protections afforded the media in defamation actions,

held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 347 (emphasis added). Although *Gertz* permitted a "private individual" to recover actual damages, presumed or punitive damages were not permitted absent proof of the *New York Times* standard "of knowledge of falsity or reckless disregard for the truth. *Id.* at 348.

The critical issue underlying the certified questions presented, a matter of first impression for this Court, is whether the First and Fourteenth Amendments to the United States Constitution require that the qualified protections afforded the media in "private" defamation actions, as set forth in *Gertz*, be extended to actions involving nonmedia defendants. Although the issue has never been decided by the United States Supreme Court, see *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979), it has been addressed in a number of state courts. See, e.g., *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Jacron Sales, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975). Since the basis of the trial court's decision to grant a new trial was its allegedly faulty jury instruction regarding the *Gertz* standards of liability and damages, a threshold determination as to *Gertz*'s applicability to the facts of this case is crucial.

In support of its claim that *Gertz*, as a matter of federal constitutional law, should apply to nonmedia as well as media defendants, defendant asserts that the former have equally compelling First Amendment

rights worthy of constitutional protection, and as such it questions the logic of affording the press exclusive immunity from the consequences of defamation. Additionally, defendant insists that distinctions between media and other information disseminating defendants are quite often illusory, and concludes that it should be considered a "publisher or broadcaster" for purposes of First Amendment protection.

We are fully aware that in certain instances the distinction between media and nonmedia defendants may be difficult to draw. However, no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services. As a result of a contractual arrangement between defendant and its subscribers, the procured information is to be kept confidential. There is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. We therefore reject, as have the majority of circuit courts, the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny. See, e.g., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir.), *cert. denied*, 415 U.S. 985 (1973); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1383 (7th Cir. 1972); *Kansas Elec. Suppy Co., Inc. v. Dun & Bradstreet, Inc.*, 448 F.2d 647, 649 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971).

Moreover, in carefully surveying the decisions of those jurisdictions which have specifically addressed the issue of whether *Gertz* should be applied to nonmedia defendants, we note that the majority have refused such an extension. Although we are not bound by these decisions, their reasoning is both persuasive and compelling. In nonmedia defamation actions, "[t]he crucial elements . . . which brought the United States Supreme Court into the field of defamation law are missing. There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Harley Davidson Motorsports, Inc. v. Markley, supra*, 279 Or. at 366, 568 P.2d at 1363. Consequently, the Supreme Court of Oregon concluded:

> Because a private individual's right to recover for libel has been made more difficult in situations in which his interests have been at least partially outweighed by important constitutional values, it does not follow, for obvious reasons, that his recovery should be made more difficult in situations in which no such constitutional values are involved merely for the sake of securing symmetry of treatment of defendants. It is our conclusion that Gertz does not require application of the constitutional privilege to actions of defamation between private parties insofar as the issues raised here are concerned.

Id. at 370-71, 568 P.2d at 1365. For other cases holding *Gertz* inapplicable to nonmedia defamation actions, see generally *Denny v. Mertz, supra; Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981); *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980);

Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056 (1979); *Rowe v. Metz, supra; Retail Credit Company v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975); *cf. Jacron Sales Company, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975); Restatement (Second) Torts § 480B, Comment e.

In light of the above, we are convinced that the balance must be struck in favor of the private plaintiff defamed by a nonmedia defendant. "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues . . . ." *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 340 (quoting *New York Times v. Sullivan, supra*, 376 U.S. at 270). Accordingly, we hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

II.

In the alternative, defendant contends that in the absence of a constitutional mandate, this Court should nevertheless adopt *Gertz* in the interests of fairness, simplicity and clarity in our state common law. Defendant's argument is based on the fear that without a heightened standard of protection in defamation actions, individuals will withdraw from, rather than pay the price of entry into, "the marketplace of ideas." Moreover, defendant insists that our common law, like the common law in the vast majority of other jurisdictions, see Prosser, Law of Torts, c. 19, § 115 (4th ed. 1971) and cases cited in 30 A.L.R. 2d 776 (1953), has already recognized, at least implicitly, a qualified common law privilege for credit reporting agencies. We disagree.

In *Nott v. Stoddard*, 38 Vt. 25 (1865), this Court recognized that there are certain exceptions to our general common law rule that malice will be presumed when words are in themselves defamatory and thus actionable per se:

> Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character. In such cases malice must be proved by extrinsic evidence, or inferred as a matter of fact by the jury from the circumstances.

Id. at 32. Although we have never *expressly* denied credit reporting agencies a qualified privilege, we have done so implicitly: "[I]f the words impute some quality, the natural tendency of which is to impair the plaintiff's professional or business character, as insolvency to a merchant, . . . they are actionable . . . ." *Darling v. Clement*, 69 Vt. 292, 300, 37 A. 779, 781 (1897) (citations omitted).

In balancing the equities between a credit reporting agency and the individual it has defamed through a false credit report, we note that "[a]n individual living in a world more and more dominated by large commercial entities is less able to bear the burden of the consequences of a false credit or character report than the agency in the business of selling these reports." *Retail Credit Company v. Russel, supra*, 234 Ga. at 770, 218 S.E.2d at 58. In light of the fact that our common law has never recognized a qualified privilege against defamation actions for credit reporting agencies, and given the absence of compelling policy reasons to do so now, we decline to adopt the rules set forth in *Gertz* as part of our common law.

III.

With regard to the question of damages, we note that "the availability of both general and punitive damages in libel actions has not been rejected as a matter of constitutional law." *Michlin v. Roberts*, 132 Vt. 154, 163, 318 A.2d 163, 169 (1974). "When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation, but he is not required to rely solely upon the implications that are applicable and may present any evidence of competent character that is authorized by his pleadings, for the purpose of showing the extent of injury and the amount of the compensation that should be awarded." *Lancour v. Herald & Globe Association*, 112 Vt. 471, 475, 28 A.2d 396, 399 (1942) (citing *Nott v. Stoddard, supra*, 38 Vt. at 30).

Likewise, in accordance with this Court's belief that "[p]unitive damages are awarded to 'stamp the condemnation of the jury upon the acts of defendant on account of their malicious character,'" *Pezzano v. Bonneau*, 133 Vt. 88, 92, 329 A.2d 659, 661 (1974) (quoting *Goldsmith's Admr. v. Joy*, 61 Vt. 488, 500, 17 A. 1010, 1014 (1889)), their availability in defamation actions involving "malice" has never been questioned. *Lancour v. Herald & Globe Association, supra*, 112 Vt. at 478, 28 A.2d at 401 (citing *Smith v. Moore*, 74 Vt. 81, 86, 52 A. 320, 321 (1901)). Although each case stands upon its own facts, *Woodhouse v. Woodhouse*, 99 Vt. 91, 154, 130 A. 758, 788 (1925), we have indicated that "malice may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Shortle v. Central Vermont Public Service*

Corporation, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979) (citing *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921)); *Lancour v. Herald & Globe Association, supra*, 112 Vt. at 482, 28 A.2d at 402; *Woodhouse v. Woodhouse, supra*, 99 Vt. at 155, 130 A. at 788.

Since "punitive damages are incapable of precise determination, their assessment is 'largely discretionary with the jury,' " *Lanfranconi v. Tidewater Oil Company*, 376 F.2d 91, 96 (2nd Cir. 1967) (quoting *Gray v. Janicki*, 118 Vt. 49, 52, 99 A.2d 707, 709 (1953)), and said assessment will not be interfered with unless "manifestly and grossly excessive." *Pezzano v. Bonneau, supra*, 133 Vt. at 91, 329 A.2d at 661 (quoting *Gray v. Janicki, supra*, 118 Vt. at 52, 99 A.2d at 709). We have cautioned, however, that though "the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that it is the result of perverted judgment, accident or gross mistake." *Woodhouse v. Woodhouse, supra*, 99 Vt. at 157, 130 A. at 789.

IV.

Guided by the rulings and principles outlined above, we turn to the certified questions raised by both parties regarding the propriety of the trial court's refusal to set aside the jury verdicts, V.R.C.P. 50, as well as its decision to grant a new trial on all issues. V.R.C.P. 59. As a basis for its motions, defendant argued that the verdicts were not supported by the evidence, in that the *Gertz* standards had not been met, that they were the product of passion and not reason, and that they were clearly excessive. In its order, the trial court noted that it had reviewed the jury instructions, all

memoranda submitted, the evidence of record, the verdict rendered by the jury and the applicable law. Persuaded that the evidence was "sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages," the trial court denied defendant's motions for judgment notwithstanding the verdict.

Defendant contends that the trial court abused its discretion in denying defendant's motions to set aside the verdicts. A careful review of the record discloses that defendant failed to renew, at the close of all the evidence, its earlier motions for a directed verdict on the issues of liability and compensatory damages. Thus, defendant's motions for judgment notwithstanding the verdict as to these two issues were properly denied. *Proctor Trust Company v. Upper Valley Press, Inc.*, 137 Vt. 346, 349, 405 A.2d 1221, 1223 (1979); *Palmissano v. Townsend*, 136 Vt. 372, 375, 392 A.2d 393, 395 (1978); *Houghton v. Leinwohl*, 135 Vt. 380, 381-82, 376 A.2d 733, 735-36 (1977); V.R.C.P. 50(b).

In determining whether the trial court abused its discretion by refusing to set aside the punitive damages award on the grounds that it was excessive, this Court is "bound to indulge every reasonable presumption in favor of the ruling below, bearing in mind that the trial court was in a better position to determine the question." *Towle v. St. Albans Publishing Company, Inc.*, 122 Vt. 134, 142, 165 A.2d 363, 368 (1960) (citing *Lancour v. Herald & Globe Association, supra*, 112 Vt. at 483, 28 A.2d at 403). In short, defendant must show that the ruling is clearly untenable and without any reasonable basis of support in the record. *Id.* (citing *Stone v. Briggs*, 112 Vt. 410, 415, 26 A.2d

828, 831 (1942)); *Dashnow v. Myers*, 121 Vt. 273, 279, 155 A.2d 859, 864 (1959).

We are not persuaded that the trial court abused its discretion in denying defendant's motion to set aside the verdict as to the issue of punitive damages.[1] There was ample evidence in the record to enable the jury to conclude that defendant's conduct was insulting, reckless, and in total disregard of plaintiff's rights. *Shortle v. Central Vermont Public Service Corporation*, *supra*, 137 Vt. at 33, 399 A.2d at 518. As noted above, "the size of the verdict alone does not indicate passion or prejudice by the jury." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (citing *Gray v. Janicki*, *supra*, 118 Vt. at 51, 99 A.2d at 709). We are not convinced that the trial court abused its discretion in denying defendant's motions for judgment notwithstanding the verdict on the issue of punitive damages. Accordingly, the fourth certified question for review, whether the trial court erred in denying all motions of defendant for judgment notwithstanding the verdict, is answered in the negative.

In the second part of its order, the trial court, persuaded that its jury instructions "permitted the jury to believe that damages could be awarded to the [p]laintiff for defamation absent proof of damages and absent a showing of a knowledge of falsity or reckless

---

[1] In its brief, defendant contends for the first time on appeal that in the absence of evidence of corporate involvement, punitive damages may not be assessed. "[W]e have repeatedly held that issues not raised below, even those having a constitutional dimension, will not be considered when presented for the first time on appeal." *State v. Patnaude*, 140 Vt. 361, 368, 438 A.2d 402, 404 (1981) (citing *State v. Prue*, 138 Vt. 331, 331-32, 415 A.2d 234, 234 (1980)).

disregard for the truth by the [d]efendant," granted defendant's motion for new trial on all issues. That is, defendant's motion for new trial was granted on the basis of the trial court's belief that its charge to the jury, insofar as it related to the *Gertz* standards of liability, was confusing. In view of the fact that our decision today holds *Gertz* totally inapplicable to the present case, we find the error harmless. In fact, we have carefully reviewed the jury instructions, and in addition to being properly charged in line with our common law rules as to liability and damages, defendant was afforded a common law qualified privilege against credit report agencies along with the ill-charged constitutional privilege outlined in *Gertz*. In short, defendant has nothing to complain about, since it received two beneficial charges to which it was not entitled.

Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.

FOR THE COURT:

_____

Associate Justice

APPENDIX B

STATE OF VERMONT
WASHINGTON COUNTY ss.

GREENMOSS BUILDERS	SUPERIOR COURT WASHINGTON COUNTY
v	
DUN & BRADSTREET	DOCKET NO. S326-77WnC

ORDER

The above-entitled cause came on for hearing before the Washington Superior Court on defendant's Motion for: Judgment for the defendant notwithstanding the verdict; for judgment on the issue of punitive damages notwithstanding the verdict; for judgment on the issue of a compensatory damages notwithstanding the verdict; and for a new trial of all issues in the above-captioned matter.

The Court has reviewed the instructions given the jury in this cause, and memoranda submitted, and has considered the evidence of record, the verdict rendered by the jury and the applicable law.

We are persuaded that the evidence is sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages. Therefore, all motions for judgment notwithstanding the verdict must be denied.

The more troublesome question is whether defendant should prevail on its motion for a new trial.

The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language

in the charge may have misled the jury to believe that damages were presumed in some amount in the case.

The United States Supreme Court held in *Gertz v. Robert Welch*, 418, U.S. 324:

> "The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

In view of the foregoing, it is hereby ORDERED and ADJUDGED:

1. That all motions of the Defendant for judgment notwithstanding the verdict are DENIED.

2. That Defendant's motion for a new trial on all issues is GRANTED.

Dated at Montpelier, County of Washington, this 19th day of October 1980.

Thomas L. Hayes
Superior Judge

Willis C. Bragg
Assistant Judge

Patricia B. Jensen
Assistant Judge

APPENDIX C

STATE OF VERMONT	)	WASHINGTON SUPERIOR
	:SS.	COURT
COUNTY OF WASHINGTON	)	Docket No. S-326-77

GREENMOSS BUILDERS, INC.)
)
v.)
)
DUN & BRADSTREET, INC.)

POST-TRIAL MOTIONS UNDER RULES 50 AND 59

NOW COMES the defendant, by and through its attorneys, Young & Monte, and moves pursuant to Rules 50 and 59 that the Court:

1. Enter judgment for the defendant notwithstanding the verdict.

2. Enter judgment for the defendant on the issue of punitive damages notwithstanding the verdict.

3. Enter judgment for the defendant on the issue of compensatory damages notwithstanding the verdict.

4. Order a new trial of all issues in the above-captioned matter.

The within motions are made in the alternative and defendant expressly reserves its right to appeal the jury verdict in this matter.

Further, the defendant calls to the Court's attention for its consideration in the context of the within motions that Rule 59 requires that a new trial shall not be

granted solely on the ground that damages are excessive until the prevailing party has been given an opportunity to remit such portion thereof as the Court deems to be excessive.

Defendant has filed its memorandum in support of the within motions simultaneously with the filing hereof.

DATED at the Town of Northfield, County of Washington, and State of Vermont this 29th day of April, 1980.

DUN & BRADSTREET, INC.
By Its Attorneys
YOUNG & MONTE

By: Peter J. Monte

cc.: Thomas L. Heilmann, Esq.

APPENDIX D

STATE OF VERMONT	)	WASHINGTON SUPERIOR
	:SS.	COURT
COUNTY OF WASHINGTON	)	Docket No. S-326-77

GREENMOSS BUILDERS, INC.)
)
v.)
)
DUN & BRADSTREET, INC.)

DEFENDANT'S MEMORANDUM IN SUPPORT OF *POST-TRIAL MOTIONS UNDER RULES 50 AND 59*

. . . .

GROUNDS FOR RELIEF

1. *The Federal Constitution Requires a Clear Showing of Malice, Narrowly Defined, to Support Any Award of Punitive Damages.*

. . . .

4. *The Court's Instructions Permitted the Jury, Contrary to Constitutional Law, to Award Presumed Damages.*

. . . .

DATED at the Town of Northfield, County of Washington, and State of Vermont this 29th day of April, 1980.

Respectfully submitted,
DUN & BRADSTREET, INC.
By Its Attorneys
YOUNG & MONTE

By: Peter J. Monte

APPENDIX E

DUN & BRADSTREET, INC. **SPECIAL NOTICE**

D-U-N-S
No. 06-675-5349 Jul. 26, 1976 Rating NQ
Greenmoss Builders Inc. Formerly

Building Contractor EE2

Box 517 Started 1971
RTE #100 SIC Nos.
Waitsfield, VT 05673 15 22 15 42 15 31
Tel. 802 496-3124

PETITION UNDER NATIONAL BANKRUPTCY ACT

Voluntary Petition In Bankruptcy Filed Under Chapter IV

Date of Filing: July 1, 1976 Case # 76-201

City & State Filed: Burlington, VT

Plaintiff's 2

Filed By: Richard Brock

LIABILITIES:
Total: $ 37,729

ASSETS:
Total: 26,835

Attorney: Richard Brock, Box 725, Montpelier, VT
Referee: Charles J. Marro, Merchants Row, Rutland, VT

07-28(76 /34) 0056/02 6 092

This report is submitted only to J. Flanagan for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within 7 days.

APPENDIX F

DUN & BRADSTREET, INC. **SPECIAL NOTICE**

D-U-N-S
No. 06-675-5349 Aug. 3, 1976 Rating —
Greenmoss Builders
Inc.
Building Contractor Started 1971
Box 357
Rte. #100 SIC Nos.
Waitsfield, VT 05673 15 22 15 42 15 31
Tel. 802 496-2561

Plaintiff's 3

CORRECTION CORRECTION CORRECTION

Any report to the effect that this corporation filed a voluntary petition in bankruptcy on July 1, 1976 under Chapter IV, file number 76-201 is erroneous and should be disregarded. The facts are that the bankruptcy was filed individually by an employee of this corporation. Greenmoss Builders Inc. continues operations as previously reported.
08-03(13 /29)0176/06 41501 6 092

This report is submitted only to _____ for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within ___ days.